REVIEWS

THE POLITICS OF INDUSTRY. By Walton Hamilton. New York: Alfred A. Knopf, Inc., 1957. Pp. ix, 169, vii. $3.50.

WALTON HAMILTON, the late[1] Southmayd Professor of Law Emeritus of Yale and a personality long and distinctively linked with that university, molded into this short and distinctive book five lectures that he delivered at Ann Arbor in 1955, under the auspices of the William W. Cook Foundation. The volume will have special appeal for those who experienced Hamilton in person, whether from across or alongside his desk or lectern, in his careers on campus, in government and in private practice. Those who were never exposed to the man himself will find this volume the next best thing. It does capture in surprising, almost magical, measure the spirit of Hamilton's tongue at work, or, more appropriately perhaps, at play. And Hamilton's special charm and effectiveness lay in his speech.

The author stretches a wide canvas, employing the term "politics" in the Aristotelian sense, as embracing all arrangements and policies through which men attempt to shape their destiny, and the word "industry" to mean the activities by which they fashion their standard of life.[2] Within this wide ambit, Hamilton offers the quintessence of views and materials he gathered over forty years of experience in several walks of life. It is an impressive performance.

The substance of Hamilton's first four lectures, his sounding of the nation's present politico-economic situation, is organized around his sharp repudiation of the conception that a "great separation" exists between the affairs of industry and the affairs of the state. He feels that the image of a self-regulating economic order, with the "invisible hand" of the market as the dominant institution, may have been a useful guide in the nineteenth century when the paramount need for rapid industrial growth and natural resource development permitted free enterprise to approximate its classic model. For today's world, in which public and private affairs are blended and all industries constitute instruments of the general welfare, he says that the concept lacks reality. Not only is control increasingly shared with agencies outside the companies involved, for example, with unions, bankers, suppliers and purchasers, but there has been an increasing call on the government to remedy deficiencies in the market system.

He objects to a characterization of our economy as a system of "free enterprise"; there are tight accords, like those which impede the launching of a new newspaper; there are legal barricades against entry into professions or trades.

1. This Review was drafted some time prior to Professor Hamilton's death on October 27, 1958.

2. P. 6.

Whereas in classical analysis "free enterprise" connoted a competitive system, the term has been retained for private ownership, however closed, restricted or monopolistic. The mingling of public and private domain is underscored by businessmen who prate of free enterprise, yet feel "free" to accept a wide range of government benefits, from subsidies to tax advantages, research projects and other contracts. At its extreme the pattern includes the airline industry type of formal regulation and subsidy; while for farmers' needs a "fusion of the voluntary and compulsory" has been invented.

Hamilton's second lecture tells an old tale afresh as it traces the "cultural erosion" of these concepts of separation and free enterprise and the steady enlargement of state domain in the economy. This trend was underway even at the height of *laissez faire*, with the "indirect dole of the protective tariff," land grants and river and harbor programs. It proceeded apace in salients like the control of currency, and later, of credit, and in the increasing regulation of railroads through the steady jurisdictional expansion of the ICC to meet the new problems generated in solving old ones.

With the growth of public control came an emergence of humanitarian values. As exceptions were carved into the initial doctrines absolving masters of responsibility for industrial accidents, employers came to support the replacement of haphazard verdicts by an administrative insurance system. Labor was permitted to unite to achieve, in Holmes' phrase, "that equality of bargaining position in which freedom of contract begins," and subsequently the Government intervened to effect an even greater equality.

By the time of the multitudinous control devices developed under the New Deal, the great separation of state and economy was dead. The independent administrative commission became a "political fashion . . . called into play where the market has failed to effect the neat adjustments."[3]

Hamilton's spirited description, in this same essay, of the "counterrevolution" of industry stresses the reappearance among modern craft groups of the type of vendor restrictions commonly imposed by medieval guilds like the Tailors of Ipswich but later struck down by common-law prohibitions. The regulation of "learned" professions serves as much or more to restrict competition as to ensure competence; and trades like those of the barber, mortician and realtor are dubbed "learned" and regulated accordingly. Kindred trends are advanced in the name of safety, health and morals: in the construction industry complex codes exclude unwanted contractors; milksheds designated for health inspection became tariff walls; liquor codes come to regulate all details of entry and sales. These intricate systems of government interference are not only tolerated, they are embraced as the means of economic salvation. "So firmly entrenched is the scheme of controls that, in fluid milk and liquor, the most radical and tormenting measure which might be taken would be to return the commodities to the free and open market."[4]

3. P. 50.
4. P. 59.

In this pattern of the conversion of controls into sanctions, the developments produced under the auspices of administrative agencies are targets for Hamilton's sharpest jibes in a section captioned "Regulation in Captivity." After the failure of the initial broad attacks by businessmen on the validity of statutes and administrative actions, there came an increasing acceptance of the sage advice of former Attorney General Olney— not to fight the ICC but to capture control.

Hamilton illustrates his point by reference to both the ICC and CAB. The ICC was set up to develop a regulatory system tailored to the railroad industry. Its attorneys and economists developed so close an association with representatives of carriers "as virtually to form a single functional group." Their conceptions limiting free entry, developed for an industry requiring huge investment, came to thwart healthy competition from competitive modes of transportation such as trucking and shipping. Similarly, the CAB employed sundry measures to discourage coach travel pioneered by uncertificated carriers, even though the Civil Aeronautics Act sought to promote extensive air transport, and the certificated carriers were then concerned only with luxury travel. In guarding against the entrance of newcomers into the industry, this agency "proved itself a willing instrument of vested carriers seeking to maintain a closed industry."[5] Hamilton furthermore warns: "And the end is not yet. In the days ahead the Government will undertake fresh ventures in regulation as in the past. And, as in the past, the regulated will use all of the drive and skill they can muster to turn the new controls to their own advantage."[6]

In "Return of the Honorable Company," his third lecture, Hamilton asserts that modern corporations have achieved a control over economic activities rivaling the charter powers granted by Westminster to "honorable companies" like the universities in England, and to the English East India Company for operations overseas. "[A]n epitome of the whole story [of the establishment of the modern corporate state] is found in the narrative of how the honorable company has turned to its account the possibilities in a simple grant from an inferior agency of government."[7] With this observation, Hamilton launches a description of the patent system in operation: the inadequacies of the Patent Office and its failure to apply those standards of "invention" laid down by the courts, devices by which corporate group research is assigned as a matter of ritual to an individual, who is designated to qualify as "inventor" and promptly to turn over his patent grant; the custom among companies of working out settlements rather than to undertake expensive and risky infringement litigation; the infinite permutations of the licensing device; and, finally, the mechanics of the "trap patent," the "umbrella patent," the "dragnet patent" and the "chain patent." Companies, he explains, use such devious and intricate methods to protect the period of monopoly, set in England at fourteen years (two apprenticeships) plus

5. P. 62. These are Hamilton's views. The CAB has a higher net worth in my own accounting. See note 25 *infra* and accompanying text.

6. *Ibid.*

7. P. 68.

a seven-year renewal, and by Congress at seventeen years. Illustrations of pooling and licensing patterns are drawn from the fields of sulfa derivatives, Vitamin D, glass containers and motion pictures (copyrights). The Honorable Company has also returned to the halls of government, particularly in time of emergency. Reference is made to the War Industries Board of World War I, the NRA (with a nostalgic note for the Consumers Division and other staff offices whose motto was, "What is good for the public will help business") and the WPB of World War II. Presently, he says, the Defense Department, the largest aggregation of purchasing power, by using invitations rather than competitive bidding, further concentrates economic power.

Political boundaries have not seriously impeded the corporations in their pursuit of gain. As the fourth lecture relates, the world's technology increasingly demands international trade. Thus, paradoxically, as frontier barriers and government restraints further arrest physical movement, the world economy is drawn into a tighter pattern through private cartels and trade in licenses and other technological arrangements. Hamilton emphasizes the thought that markets are divided by treaties never ratified by the Senate. Even during war, companies on opposite sides maintain hopeful contact through neutral nations. He describes, in particular, the complex arrangements devised before World War II in the borax, match and rayon industries; and the Phillips electronic imperium, whose split-second plans for amoeba-like division were designed to observe the protocol of wartime regulations. Today, a new business-state problem is emerging in regard to the export of technology to backward lands.

These four lectures might be summarized by saying that Hamilton has described a number of methods and maneuvers by which private industry, in pursuit of gain, has strengthened its techniques of self-government and has, depending on circumstances, ignored, circumvented or appropriated to its own use the machinery of the state. So simple a statement, however, quite misses the impact of the book; for the author's wise saws and specific instances occur in such volume and pace as to convey an indelible impression of the great resourcefulness and complexity of the efforts that have been made by corporations in the past—and, presumably, that can be expected in the future.

Homage is due the man whose successive careers enabled him to draw on this wide array of materials and experiences. Readings developed over forty years ago as a by-product of his economics course at Michigan underlie many of his historical accounts.[8] Hence, when Hamilton makes a passing reference to "the simple days of Joseph's corner in wheat"[9] one can be confident that the Bible does indeed support the view that Joseph received good prices on his

8. CURRENT ECONOMIC PROBLEMS (Hamilton ed. 1915) (preliminary edition privately printed by the University of Michigan in 1914).

9. P. 142.

sales in lean times of the crops he stored when harvests were good. Hamilton's recurrent theme of the infinite flexibility of industrial organization in the face of state intervention is grounded in a price policies study he supervised in New Deal days, which emphasized the tangle of industrial arrangements and structures.[10] Also prominent in the essays is the experience of his tour with the Department of Justice from 1938 to 1945, at a time when international cartels and patent abuses were the focus of particularly intense investigations.[11]

Although to manage and distill these sources into this slender volume was nothing less than a great *tour de force*, a caveat must be reserved for the style. The organization and pace of the illustrative materials give a drive and impetus that make the author's impressionistic approach vivid indeed. But the author has also seen fit to expatiate freely over the wide and varied field before him; and though the idiom and cadence are often brilliant, a number of passages are overwritten to the point of intruding upon and even obscuring thought. These tendencies are not new, but they were mitigated in the author's earlier works by the greater weighted average of his specific research.

It is the fifth and final lecture, "Salute to the Great Economy," that presents the greatest problems, and for reasons more basic than style. Hamilton asserts that today the "politics of industry" reflects the daring inventions fashioned by industry as an adjunct to the pursuit of gain, rather than by efforts to contrive effective public controls. But *laissez faire* cannot be depended upon to keep the national economy an instrument of the general welfare. "We can no longer allow the arts of politics to remain backward." Here, then, is the place in the author's summing up where he may be expected to help chart the course ahead. Yet, as he considers possible alternative approaches to insure corporate responsibility to private interest within the framework of the general welfare, he becomes strangely diffident and negative.

First, Hamilton considers what he calls the "way of conscience." But, he argues, the corporation cannot be free to do whatever is right in its own eyes; there must be a standard. Unfortunately, however, the principle that no man may try his own case has not yet been completely established in the affairs of corporations. Some companies, to be sure, adopt a view that is broad-gauged and long-range, but others do not, perhaps because they cannot afford the "luxury of ethics." The fading separation of economy and state has brought to

10. HAMILTON, PRICE AND PRICE POLICIES (1938). A Cabinet Committee on Price Policy was established by the President in 1934. A small staff worked on this problem for three years, housed from time to time in the BLS, NRA and Consumer's Division. Their study focused on clinical reports of seven industries. Hamilton's preface voices his hope that although individual practices will surely change, the general lines may continue to hold, so "that for some time to come this volume will not cease to tell the curious reader the manner of thing an industry is." *Id.* at ix.

11. Professor Hamilton, with some able assistants, wrote the notable *Patents and Free Enterprise* (TNEC Monograph No. 31, 1941) as a study for the Temporary National Economic Committee.

the fore a conflict of interest; the Government necessarily calls to service corporate officials unacquainted with the objectives of public policy, whose previous experience breeds a dual role not cured by a sale of stock.

Second, an appeal can be made to the theory of competition. But businessmen may restrain competition alone or in concert. The antitrust laws are more apt for petty trade than the great economy, and are salvaged if at all, only by the flexibility of the courts. And "the fact remains that the direction of industrial activity to public ends is a constructive, not a punitive, task."[12] Antitrust suits, moreover, are protracted, partly because the Government must present a long-range setting to illuminate current wrongdoing and partly because of defense tactics. The evils are roundly condemned, but their roots are not removed (the courts being more prone to "antitrust" findings than remedies), and they may re-emerge unchallenged because of an inadequate follow-up.[13] Antitrust standards themselves are jeopardized, says the author, by myths of advisory committees who, on the one hand, avow a demand for simplicity, and, on the other, seek a rule of reason based on "effective competition" which would blur all manageable standards of judgment. Finally, the scope of antitrust law is being undercut by doctrines of primary jurisdiction, particularly since antitrust policies are ignored by the administrative agencies, whose spur is rather to extend the area of cooperation and, incidentally, their own control.

Third, Hamilton dissects the "way of regulation." The agencies' decorous procedures do not catch up in time with lapses of management. Congress, unmindfully, expands the area of controls while the agencies' existing domains lie fallow. The commission is lost in the bustle of board review of specific complaints and fails to initiate larger programs designed to make the industry a more effective instrument of the general welfare. Aggravating the condition is the method of selecting commissioners without regard to special competence for the distinct tasks involved. Since devotion to public service may be a hazard to reappointment in the face of industry pressure, commissioners and staff alike tend to "play it safe"; staffs deteriorate as the more able and responsible men depart. Review by Congress is ineffective, particularly since the agencies soft-pedal a full and candid report of their actions. Furthermore, a new myth of responsibility to the President has served to enlarge the area withheld from outsiders as "confidential." Review by the courts, in view of the enormity of the load, must defer, in addition, to an ill-defined expertise. And so administrative acts go essentially unreviewed. The industry can mass its resources at the right place and time while "the far-flung and inarticulate public usually remains mute. To repeat, the commission is not the happiest of political inventions."[14]

12. P. 144.

13. *Ibid.* These and related comments are to be found also in HAMILTON & TILL, ANTITRUST IN ACTION (TNEC Monograph No. 16, 1941) and in Hamilton's ensuing lectures, *The Pattern of Competition* (1940).

14. P. 160.

In a final plea the author urges the maximum play for individual creativity in the shaping of future controls. The nation is not required to choose between the absolute of *laissez faire*, with a new phrase like "countervailing power" to replace "invisible hand," and the absolute of comprehensive state blueprints. As large an area of the industrial system as possible should be left to the competitive regime. For use of another method of control, the case must be clear. Mergers should be prohibited where a hazard of concentration of economic power exists which technology does not require. Other relatively specific lines of reform are sketched—effective restoration of inventions to the public domain (after a limited patent period) and the modification of governmental procurement policy. Hamilton leaves the problems of the administrative agency with the comment that they are not easily solved and will continue to harass us until an adequate substitute is invented. He concludes with a stirring plea:

> The economy today calls for its degree of regimentation. It demands more than other economies that the gears engage, that the switches lock. It necessitates a great cooperative effort of the first magnitude, which to a considerable extent invites regulation. But in this process it is imperative that the cry of enterprise be not stilled, that the minority be allowed to have its chance, and that there be a thousand points in the larger system at which creative thought and effort may be applied. . . . It is not important that the arrangements which currently are set down as the competitive system will endure. It is important that the spirit of competition shall be enhanced and not impaired. There must be an outlet for the creative urge, free play for the dynamic drive.[15]

Without quarreling with the author's conclusion or with most of the observations of his fifth lecture, taken one at a time, one can legitimately object to the negative tone that weights the total impact of this summing-up. Neither this nor that system of control is effectively designed to further the general welfare, he seems to say, and since the state will tend to bungle its controls anyway, it should intervene as little as possible, and, then, only in such a way as most respects individual initiative.

But the picture with respect to the effectiveness of the state's machinery is not so bleak as Hamilton makes it out, though improvements are sorely needed. And private industry deserves a more affirmative presentation, one showing its effectiveness not only in technology or the political art of undercutting and utilizing state sanctions for private gain, but also in the positive achievement of the general welfare. Hamilton's ultimate conclusion that the less tinkering the better requires no qualification; but such a conclusion ought to be predicated on the beliefs, first, that there is still capacity for effective tinkering where need be, and second, that in general there is little if any need now.

Favorable performance of the economic system is undoubtedly an implicit premise of any policy emphasizing the avoidance of unnecessary controls. Today, the instrument upon which we depend for material wealth supplies,

15. Pp. 167-69.

in ample measure, material goods and services, constructive leisure and opportunities for attainment. To underrate the role of government in terms of expenditures for defense would of course be folly. Even more extensive state direction of resources may well emerge, as advocated in recent critiques,[16] regardless of the party in power. With all due allowance for the intervening role of government, however, the performance of the private sector of the economy has been outstanding—by any standard. There are important values, then, in recent efforts to articulate and reinforce that sector's strengths. The concept of "countervailing power"[17] is indeed not a complete creed of economics that stands alone like a closed hydraulic system. But it serves to describe a parallelogram of forces that is presently maintaining both equilibrium and momentum.

Hamilton soundly declines to make an *absolute* commitment to the so-called "way of conscience," which certainly goes very far to suggest, as Lilienthal has, that widespread expansion of the role of big business in pursuit of gain would yield benefits outweighing disadvantages.[18]

Yet there is need to ponder more seriously the possibilities that lie ahead in Berle's vision of an increasingly enlightened industry with a sense of social conscience and responsibility.[19] The great pyramids of corporate power have an obligation to the community, whether or not avowed, to supply material wants, to charge "acceptable" prices, to provide some continuity of employment and to maintain technical progress in the art. But emphasis on initial responsibility within the corporation does not require an exclusive commitment to the corporate entity. In Berle's own phrase, a philosophical need exists for modern "lords spiritual" to serve as a check on the exercise of power by the corporate "lords temporal."[20] For lawyers and law students, there is an additional fillip in the prospect of an emerging "way of conscience," for the standards, which must be tested somewhere outside, will be increasingly interpreted by corporate counsel who serve the corporation as the old chancellor did the king.[21]

With respect to the problem of the administrative process, Hamilton's doling of its inadequacies leaves a residue of uneasiness, an impression much like that produced by those who deem administrative discretion in regulation an iniquity of tyranny and a negation of the rule of law. One recalls a popular article

16. See GALBRAITH, THE AFFLUENT SOCIETY (1958).

17. See GALBRAITH, AMERICAN CAPITALISM—THE CONCEPT OF COUNTERVAILING POWER (rev. ed. 1956).

18. See LILIENTHAL, BIG BUSINESS: A NEW ERA (1953).

19. See BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954).

20. See BERLE, ECONOMIC POWER AND THE FREE SOCIETY (1957), Mr. Berle's contribution to the discussion of "The Free Society"—a topic currently under study by the Fund for the Republic. In this pamphlet, Berle advances his proposition as one of the fundamental questions of freedom and justice in contemporary society.

21. See Hickman, *The Emerging Role of Corporate Counsel*, 12 BUS. LAW. 216 (1957). The analogy to the chancellor drawn by Hickman, who is Vice President and General Counsel of the Aluminum Company of America, stems from the staff position of corporate counsel. House counsel is detached from operations, is charged with a wide span of responsibilities, and often is (and certainly should be) aware of political processes.

of wide circulation by former President Herbert Hoover,[22] which says many things that Hamilton would not dispute: civilized countries cannot rely solely on *laissez faire* but have a responsibility to enact laws to prevent men from doing economic injury to their fellows; there should be a "fifth freedom" to engage in enterprise, so long as each does not injure his fellow men. But from these premises, and a cognate that bureaucracy cannot develop the same competence in management as that which comes from the mills of competition, Hoover leaps to a very different conclusion and proclaims: "When Governments exert regulation of economic life, they must do so by definite statutory rules of conduct imposed by legislative bodies that all men may read as they run and in which they may have at all times the protection of the courts."[23]

The purpose here is not to enter the lists alongside those who have jousted in learned journals with such views, typically by charging at Hayek's *Road to Serfdom*, or those who have decried the falsity of contrasting planning to freedom and administrative discretion to the rule of law.[24] There is not the slightest doubt of Hamilton's conviction that, whatever its shortcomings, the administrative process is necessary to give, in his pet term, "concretion" and vitality to the legislative programs needed to remedy serious market imbalance or bargaining inequities; and that reasonable assurance against absolutism can still be found in appropriate recourse to courts and Congress. Yet, a recital of the short-comings of the administrative process without either the perspective of past, or the hope of future, accomplishments may skew the reader's course.

Commissions regulating a particular industry do indeed tend to identify with the industry they regulate. They are in fact subject to great pressures and the temptation to "play it safe." Yet, picturing them as lackeys is inaccurate. The Civil Aeronautics Board did err, I think, in its approach to the air coach problem. But the issues are clearer now than they were then; the problem which the Board confronted was complicated by the impudence of the necessitous coach pioneer, and it was overlaid with doubts as to the impact of coach fares on certificated carriers, doubts engendered in part by the large airline losses in the early postwar years. An objective picture of the CAB would have to include, among other examples, its actions, at least at times and in some measure, to aid the spread of lower fares—particularly in transatlantic operations.[25] And in recent years, the CAB extended the certificates of smaller

22. Hoover, *The Fifth Freedom*, The Rotarian, April 1943, p. 8, reprinted in EBENSTEIN, MAN AND THE STATE 359 (1947) and HOOVER, ADDRESSES UPON THE AMERICAN ROAD—WORLD WAR II, 1941-45, at 222 (1946).

23. *Id.* at 222-23.

24. I should like to applaud a recent entry that strikes deep into jurisprudence and yet is easy to read. See Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143 (1958).

25. See Bebchick, *The International Air Transport Association and the Civil Aeronautics Board*, 25 J. AIR L. & COM. 8 (1958).

Criticism that the CAB failed to act in the public interest when it rejected the Trans-

carriers in a move that was more responsive to broad political considerations than to the wishes of dominant carriers [26]—a move that has been blamed, with exaggeration, for some of the economic ailments now besetting the industry.

The view that administrative agencies are oriented away from antitrust policies is not without foundation, but the matter is complicated by the problems and patterns of each industry. The FCC, for one, did evolve rules and standards encouraging competition and discouraging tendencies toward media concentration and monopoly. By no means, however, can a simple formula be devised to define the desirable play of competition in each regulated industry.[27] The result in *FCC v. RCA Communications* [28] is regrettable; the commissions should be permitted and encouraged to predicate orders solely on the policies of the antitrust laws, that is, where a contrary policy is not indicated by more customary regulatory considerations. In view of the subtlety and complexity of the issue, however, the remedy is more likely to lie in further decision than in statute.

Selection of personnel is, of course, the key to administrative effectiveness. And the range of selection is in turn dependent upon the standing of the agency and its staff in the community. At the commission level, experience or technical competence in the particular industry should be considered relatively unimportant. Corporate executives who leave one industry are commonly welcomed in another, quite different industry; the feeling is that they can pick up what has to be learned from technicians. If time is lost in the process, there may be a more-than-compensating freshness of approach. The call on lawyers to serve as commissioners is not unmerited. "The competent lawyer is essentially an expert in relevance."[29] He has developed a knack for formulating and ad-

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American non-sked plan, even if justified, has engendered inferences of agency passivity and industry domination that are overdrawn and extreme. During the period 1945-1949, when, because of its concern with subsidy problems, the Board was not very receptive to proposals for lowering fares, it nevertheless approved promotional fare programs, such as the family fare plan, the summer excursion fare, Capital's night coach plan and, in December 1949, American's excellent day coach service. And beginning in 1951, the CAB issued a series of statements prodding the carriers to develop air coach. Since 1955, moreover, the CAB has been vigilant in promoting lower transatlantic fares. Its record may be subject to some criticism in regard to domestic first class fares; yet, the total picture is that of an agency ahead of the thinking of most of the certificated carriers.

26. See the Report on Airlines, filed April 5, 1957, by the Antitrust Subcommittee of the House Judiciary Committee, expressly commending the CAB for its recent decisions, starting in 1954, strengthening the smaller domestic trunk airlines (pp. 1110-14). This was transmitted to the House by the Judiciary Committee on February 4, 1958, see H.R. REP. No. 1328, 85th Cong., 2d Sess. (1958).

27. A spirited difference of approach is marked in Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954), and Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

28. 346 U.S. 86 (1953).

29. Frankfurter, *The Government Lawyer*, 18 FED. B.J. 24, 25 (1958).

ministering policy and for maintaining continuity with reason—that is, without rigidity.

The problem of the commissioner who trims his sails to ensure reappointment is difficult. A tradition of lateral transfer rather than long continuance in the same office may provide an answer compatible with the needs of those who seek and merit careers in the service. But the commissioner's post is a policy one, and the inclination to build careers at the commissioner level should not be encouraged.

This is not the time or place to grapple with the problem of improving the administrative process, and the foregoing discussion is intended only to register a feeling of the disappointment one experiences when a man with Hamilton's range and background concludes by shrugging off the commission as an unhappy invention. Success or failure of the commission is due predominately to the quality of its membership which, to repeat, depends on the agency's esteem in the community.[30]

In our complex society, a safe prediction is that administrative agencies will increase in number. Whatever the pressures, political or industrial, the structure of a five- or seven-man bipartisan board tends to absorb them. To be sure, further work must be done toward delineating the board's optimum role. But the operating experience of management can be given its due without minimizing the function of policy review in the public interest. Often broad issues can be aired before the time when decisions must be made, particularly where the various economic interests differ in their views. The agency's purpose can yet be defined in terms which minimize the chores of red tape and emphasize the creative spirit both of the regulated industry and, for that matter, the agency's own staff.

HAROLD LEVENTHAL†

Postscript

I confess I would not have written the same review if I had known at the time how ill Hamilton was—and, more important, under what difficulties he labored the last several years. Yet, I have decided to make no changes on that account. I think Hamilton would have wanted none. The disappointments I register herein do not undercut, they rather underline, my admiration for the man, his contributions and his book.

H. L.

30. I adhere to the view of the 1948 Hoover Commission that the President should designate commission chairman in aid of communication *on questions of broad national policy.* That Commission accepted a task force recommendation for which I am partly responsible. The experience of recent years has shaken, but not shattered, my conviction.

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REVOLVING DOOR. A STUDY OF THE CHRONIC POLICE CASE INEBRIATE. By David J. Pittman and C. Wayne Gordon. Glencoe: The Free Press and Yale Center of Alcoholic Studies, 1958. Pp. xx, 154. $4.00.

THE enforcement and administration of criminal law is often portrayed as a momentous battle in which forces of law and order are pitched against crafty and ruthless underworld figures. Police are trained as "gang busters" who, with tight lipped efficiency, construct "dragnets" through which even the most artful underworld fish cannot slip. These are the police shown in movies, television, the popular press. Real life station-house activities are less dramatic. Most bookings are for violation of the motor vehicle laws. Next come arrests for public intoxication or drunkenness. According to this useful study of the "Chronic Police Case Inebriate," arrests for public intoxication or so-called "disorderly conduct" in 1955 totaled over 100,000 in Los Angeles, over 50,000 in Chicago, and around 40,000 in the District of Columbia.[1] Furthermore, public intoxication is not only a frequent *arrest* category, it is also a frequent *conviction* category, one which provides county or short-term penal institutions with a large number of incarcerated offenders. In the institution studied by the authors, the Monroe County State Penitentiary, which receives offenders from thirteen western New York counties, seventy per cent of the 1,919 inmates who entered in 1954 were charged with public intoxication.[2] That report comes from apple-growing country. Further south and east, in wealthy Westchester County, the local state penitentiary reports a lower but still impressively high figure. Of its total of 1,559 commitments in 1954, forty-four per cent were for public intoxication.[3] This latter report does not, however, include offenses closely associated with excessive drinking, such as disorderly conduct, vagrancy, or aggravated assault, to say nothing of offenses like sodomy which may be accompanied, if not precipitated, by drinking. The chronic police-case inebriate is a national phenomenon, a problem for the wealthiest counties as well as for the poorest, for the urban (and urbane) as well as for the rural.

Pittman and Gordon set themselves the task of describing this phenomenon, socially, behaviorally, developmentally, interactionally.

Socially, they find that the chronic police-case inebriate is middle-aged or older, probably Irish or Negro, as likely to be from a rural as an urban background, currently unattached to a female (although fifty-nine per cent had been married), a worker, usually unskilled, equally likely to be Catholic or Protestant (if affiliated with any religion), and in most cases of a lower social class. His criminal history reveals previous arrests either for public intoxication, or for additional charges ordinarily related to the use of beverage alcohol, or for serious criminal violations. The frequency of serious violations (for those with such a history) sloughs off after age thirty-five or forty, the offender

1. P. 2.
2. *Ibid.*
3. *Ibid.*

generally settling down to a steady pattern of arrests for public intoxication. His propensities toward drinking apparently operate as a rather odd but nevertheless effective social control on aggressive criminal behavior.[4]

Two interesting *behavioral* findings distinguish these men from the middle-class alcoholic, the kind with whom the Alcoholics Anonymous approach works effectively. Eighty per cent have had some experience living in institutions,[5] a finding which supports the psychoanalytic theory of dependency to explain alcoholism, and which also suggests that a man who gets himself arrested sixty or seventy times has found a home in the jailhouse—reeking and vermin-infested perhaps, but nevertheless a home. No courtroom harangue is going to starch the moral fibre of this character and put him on the sober path to loneliness and rejection. The unconscious motives of the chronic police-case inebriate are more powerful than the conscious homilies of judicial straightener-outers.

The second finding springs from the first. A chronic police-case inebriate does his drinking in groups, as contrasted with the middle-class alcoholic, the A.A. candidate, who drinks alone.[6] Contrary to popular supposition, Alcoholics Anonymous is relatively ineffective with police-case inebriates or, more to the point, lower-social-class inebriates. Talk to a prison administrator who runs an A.A. program, and if he is forthright he will inform you (usually with a look of bemused exasperation) that A.A. is largely ineffectual in rehabilitating his alcoholics, although they attend meetings because attendance looks good to the parole board. Police drunks find emotional support and reinforcement in the "bottle gang," the drinking group, not in the sober confessional of the middle-class A.A. world (an exercise which probably appears to the "mission-stiff" as a replica of Salvation Army evangelism—in his eyes a ritualized exchange of pretended spiritual redemption for institutional bed and board).[7]

A self-respecting, lower-class, skid-row type is not likely to fall for the "power-greater-than-yourself" tenet of Alcoholics Anonymous. He's heard it all or something akin to it at "Sally" (Salvation Army) revivals, and there, at least, he was among his own friends. The middle-class alcoholic, on the other hand, even when on Skid Row, doesn't "connect" emotionally with the others. Consequently he is able to benefit by redemption or by rehabilitation into the inviting structure of middle-class ideology. The police drunk does not relate to the middle-class identifications, demands and expectations built into the A.A. formula. He is not willing, nor even able, to defer gratifications for a good job and dry Saturday night bridge games followed by doughnuts and coffee. He cannot be rehabilitated because he was not "habilitated" in the first place. As the authors make clear in describing his development, he is "undersocialized."

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4. Pp. 16-58.
5. Pp. 65-66.
6. Pp. 69-71.
7. For a particularly incisive discussion of "skid row" subculture and its effects, see Rubington, *The Chronic Drunkenness Offender*, 315 ANNALS 65 (1958).

By this term they mean to indicate that, as regards social *development*, chronic police-case inebriates have not experienced the quality of family and community relationships that anybody reading this review has (and that most A.A.'s have as well). Their childhood history is marked by parental death, separation, divorce or desertion. They lack social skills in dealing with others, skills that are learned in the family and other close primary-group associations. These skills, these perceptions of how to deal with other persons, of how to handle personal feelings, to channel, enlarge and turn them to socially acceptable creativity, these exemplify the meaning of socialization, and these are what the police inebriate has not learned.[8] He cannot be rehabilitated. He has to be newly socialized in middle-class, everyday, you-and-me terms *if* he is to function in middle-class society; a big if, indeed, and one beyond the scope of the present discussion.

Because he hasn't learned these social skills, the police inebriate is an *interactional* failure: he cannot adequately perform what the authors call "secondary task roles." In other words, since he hasn't been brought up in a family, he doesn't know how properly to act like a husband. Since his schooling has been fragmentary, he doesn't know how to approach and solve even the circumscribed intellectual problems that factory workers soon learn to handle.[9]

But there are a lot of things he does know, and these the authors fail to enlarge upon sufficiently. He knows the rules of sharing a bottle. He knows which "Sally" mission serves the best food. He knows which town has the cleanest jails. He knows how to size up a touch. He is able to perceive guilt, superiority, revulsion, distaste, aversion, fear, shyness, humor, and, possibly, even interest and affection.[10]

What should be "done" about the chronic police-case inebriate? This book is a good beginning toward doing something about him. It presents organized information that, although not entirely lacking, had previously been scattered and incomplete even on the relatively simple descriptive level that typifies most of the pages of this volume. It is by no means a definitive book, but by and large, it is a craftsmanlike job that should be on the shelf of every city judge and lawyer who is interested in criminal administration.[11] After all, its subject-matter is presumably their best customer; and, although this customer is probably always wrong, it is a good idea to know what he is like.

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8. Pp. 78-108.
9. Pp. 109-24.
10. Rubington, *supra* note 7.
11. I must modify that craftsmanlike description, because of a quirk trained into me by a group of technically demanding professionals who insisted that numerical data be presented clearly. It is conventional to avoid reporting percentages where the total number of cases is much less than one hundred. In Table 15 (p. 44) a total number of nineteen cases is reported; consequently one case is reported as 5.3 per cent (in the category 10-19 arrests) of the total of men under thirty-five. I am reminded of the report that emerged from Johns Hopkins University some decades ago. The school had recently permitted women to enter and announced that thirty-three per cent of its women students had married faculty members. This report indicated an extraordinary intimacy of student-

The book does more than present results, however. While scarcely scratching the potential research surface, it makes suggestions, well worth considering, for further research and for dealing with these men. Unfortunately, it contains only a short paragraph attacking the *status quo*:

> Given the failure of the present system to cope with the problem of the chronic police case inebriate, a new system or philosophy should be envisioned built on the concept of treatment and rehabilitation instead of punishment and custodial care. The present system hardly does more than allow the inmate to build up his physical resources for a new drinking bout upon his release and then to lapse back into the hands of the police.[12]

And this is the whole discussion. Although the raw sociological facts revealed in the book provide a convincing indictment, some further elucidation might have been given to the financial waste that goes through the revolving door. No automobile dealer in his right mind would try to repair a car by using the same ineffectual method eighty times running. Yet the state arrests and rearrests, convicts and reconvicts, confines and reconfines, releases and rereleases over and over again. The money outlay alone must be staggering, to say nothing of human considerations. Clearly aware of the financial problem, the authors nonetheless present no concrete dollar figures, such figures being a prerequisite to moving the hard (and often thick-) headed "realists" into action on pressing social issues. The customary means of acquiring funds has been to appeal to a sense of justice. Cost accountants and economists could possibly deliver a more effective approach, for (to swipe an epigram) the dwindling dollar is mightier than the bursting exhortation.

But, to return to the central problem of how to do it—instead of how to get somebody, thing, agency or foundation to support its doing—the authors, referring to Pinel unshackling the mentally ill in the prisons, suggest a treatment center for receiving the chronic public inebriate. They suggest trying systematic treatment of physical ailments, psychological rehabilitation ("psychotics should be sent to their proper place in the mental hospitals")[13] and social restoration. They further advise a parole-type release procedure and a "halfway house" or temporary institutional home for alcoholics who have exhibited a pattern of dependence upon institutional living. Similarly, they suggest varying the treatment program in accordance with characteristics such as race, age, and psychological makeup. And finally, they make the usual suggestion for a continuing program of research.[14]

These suggestions are broad in scope, brief in substance, and altogether too lightly considered. What kind of "treatment center" the authors have in mind

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faculty relations until it was learned that the total enrollment of female students was three. Table 24 (p. 72) omits reporting the total number of cases entirely, although I presume, from the categorization and another 5.3 percentage figure, that the total number of cases is again nineteen. Such handling of percentages is hardly excusable.

12. P. 141.
13. P. 142.
14. Pp. 141-46.

is difficult to determine. Transforming a jailing system into any sort of treatment program raises difficult legal problems, particularly if civil commitment is substituted for criminal proceedings. As matters stand, an arrested drunkard is entitled to the full protection of the criminal law. He has, at least in theory, a right to private counsel (if he can afford a lawyer),[15] a right to appeal, and a right to a statutorily fixed sentence. True, an overwhelming majority of arrested drunkards appear for trial without counsel, probably are not advised of their rights to counsel, and usually make no *formal* waiver.[16] Moreover, many offenders who stand trial may not be legally competent to do so. These are no high-flown civil-liberties concerns, at least not to the gent who does extra time in the jailhouse. He must accept the sentence regardless of whether, with the advice of an attorney, he could have been tried on another charge, "copped" a lesser plea, or presented a defense creating a reasonable doubt in the mind of the judge. But even if his right to counsel is imperfectly safeguarded at present, he is, in principle, as entitled to the full protection of the criminal law as any other defendant.

To the chronic offender, the most important right is that to a determinate sentence. Under a civil commitment procedure, which the authors seem to be advocating, the chronic police offender would be regarded as a "sick" person, which he is, and, once in a treatment center, might be exposed to skills and understanding unavailable in jail. But he might never get out. What will be the standards for release from a treatment center? What are to be the criteria of a successful treatment? Suppose, after a man is released on "parole," he becomes drunk. What is his status? Is he to be returned for further treatment? Suppose he once again gets drunk? And again, and again? Is he to be given a life sentence for drunkenness after a specified number of violations? Is the state to proceed from a criminal multiple felony law to a civil multiple hangover enactment? These questions are not merely rhetorical, but raise serious issues which the authors fail to discuss in their well-meaning but narrowly conceived demand for treatment.

Voluntary treatment appears preferable to commitment, and can be made available within the bounds of the current system.[17] In fact, voluntary-treat-

15. *Cf.* Betts v. Brady, 316 U.S. 455 (1942).

16. Evidently, no study examining the extent to which procedural safeguards are followed in trials of drunken offenders has been completed. There is probably no constitutional right to court-appointed counsel since these are mostly misdemeanor cases. Rarely is there any statutory right to court-appointed counsel.

17. In the State of Connecticut, for example, a third criminal conviction as a common drunkard carries a maximum sentence of 360 days. CONN. GEN. STAT. § 8644 (1949). Nevertheless, after three such convictions any justice of the peace having criminal jurisdiction (as well as higher judicial tribunals) may commit the offender to the State Commission on Alcoholism "for a period of not less than four months, nor more than three years." CONN. GEN. STAT. § 2733 (1949). Under a civil commitment proceeding, the chronic drunkenness offender, therefore, could in effect be sentenced to three years at the time of his fourth arrest. In practice, § 2733 has never been invoked, except by one municipal court judge who repeatedly committed offenders for four-month periods to

ment programs currently exist in some states, such as Connecticut, and any lack of pronounced success is attributable not to the nature of the legal sanction but to the relatively insignificant gains that have been made in scientific research.[18]

The research issue—having to do both with quantity and quality—is two-sided. No one can quarrel with the authors' demands for more research initiative, funds and facilities, but their conceptual discussion is not altogether satisfactory. Having pointed out quite correctly, for example, that different types of police offenders will require different kinds of treatment, the authors then classify offenders into three types: the Negro, the older offender, and the mentally disturbed.[19] One of these classifications, the Negro, is examined below to illustrate the shortcomings of this analysis.

Admittedly, the Negro subculture has distinctive characteristics, but the same is true of every other ethnic subculture, whether Irish, Old American, German, Scandinavian. The authors set apart a separate Negro classification because eighteen per cent of the penitentiary sample consists of Negroes, as compared with the two per cent that Negroes compose in the residential population. But this finding in itself should not dictate a special Negro category. Other research has demonstrated that a high Negro arrest rate can be explained as a reflection of a high lower-class arrest rate.[20] Negroes may constitute eighteen per cent of the penitentiary sample only because they constitute at least eighteen per cent of the arrest-prone, lower-class population from which the penitentiary sample was drawn. Thus, despite their apparently high arrest rate, lower-class Negroes may be arrested for drunkenness proportionately less often than lower-class members of other ethnic groups (e.g., Old American) who form only a relatively small part of the total lower-class population.

The authors try to explain the high Negro incarceration rate as a function of disproportionate susceptibility to arrest.[21] According to their theory, policemen in western New York State are more likely to arrest Negroes than whites for a given offense. Actually, no data are presented to support this theory other than those already noted. It is equally possible to maintain that Negroes are less susceptible to arrest than whites. Negroes conceivably constitute more than eighteen per cent, perhaps as much as fifty per cent, of the population in

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Blue Hills Hospital, the only in-patient institution operated by the State Commission on Alcoholism. Blue Hills Hospital was intelligently designed as a noncustodial institution and wisely follows the policy, whenever possible, of admitting patients only on a voluntary basis.

18. There are presently at least thirty-one halfway houses operating in seventeen states, the District of Columbia and one Canadian province, according to an unpublished 1958 survey made for the purpose of proposing legislation to establish two halfway houses in Boston. The survey was made by the Office of the Massachusetts Commissioner on Alcoholism. A copy of the report is on file in Yale Law Library.

19. Pp. 143-44.

20. Skolnick, *A Study of the Relation of Ethnic Background to Arrests for Inebriety*, 15 Q.J. STUDIES ON ALCOHOL 622 (1954).

21. Pp. 20-22.

neighborhoods where these arrests are common. If so, Negroes in those areas are less susceptible to arrest than their white neighbors—assuming unlawful activity is uniform between both groups. Of course, if Negroes are less unlawful than whites, their susceptibility to arrest is so much the greater. But if they are in fact more unlawful than whites, their susceptibility to arrest is comparatively low.

Negro offenders differ from whites in several respects. The Negro population is younger—sixty-six per cent of Negroes as compared to thirty per cent of whites are under age forty-five. Negroes have fewer repeated arrests. And they are moving from rural south to urban north.[22] All of these are useful facts; so is the fact that an offender is a Negro. But not all Negroes present equivalent sets of social characteristics. There are some elderly, meek, urban Negro alcoholics as well as young, aggressive, newly-launched, recently-rural Negro alcoholics. Hence, in using "Negro" as a diagnostic and therapeutic concept, as, if you will, a scientific term, the authors err in mistaking conspicuousness for conceptual precision.

The concepts "the mentally disturbed" and "psychological rehabilitation," are too commonplace to be useful. If they refer to nothing more than conventional distinctions, they needn't have been set out as evidencing original knowledge. If, on the other hand, they contain new insights on the relationships between particular syndromes and chronic alcoholism, such content is unrevealed.

Instead of merely ticking off conventional distinctions, the authors should have spent more time exploring the three important dynamic factors that distinguish chronic police offenders from other alcoholics: that chronic police offenders drink in groups and evidently have a subculture of their own; that these groups provide the individual not only with alcohol but also with emotional identification, with the satisfaction of demands for valued objects and feelings, and with expectations of future indulgence or deprivation of these demands; and, finally, that chronic offenders often subordinate their demands for drink to values encompassed in the group perspective.

The real challenge of research is to make something of this knowledge, to build it into the whole system of therapy, from initial fact gathering to overt group manipulation and direction. At present, the right questions are not being asked at the right time. Nothing is known about what an offender believes when he goes to jail or a "halfway house"; consequently, it is not possible to measure the effects of either negative sanction or positive treatment upon the values held by the offender. To meet the matter systematically, knowledge is needed on, for example, whether, at the time sentence is imposed, an offender feels rather hostile to the authorities, or fairly friendly; anxious and fearful, or relaxed and unafraid; lowly and inconsequential, or held in respect by his peer group; guilty and self-punitive, or unconcerned with his moral worth—perhaps martyred. Likewise unknown are whether he is at that time ill-informed, or

22. P. 21.

knowledgeable and clear as to expectations; disorganized, or skillful in meeting the situation; without barter for exchange, or fairly resourceful; weak and apathetic, or interested and able to make decisions.[23] Data is entirely lacking on if and how his feelings change through time, and on the expectations underlying his feelings, whatever his feelings may be. The extent of his demands—either those he makes upon himself or those he makes upon others—also invite investigation.

Concepts like age, race, or psychological make-up are treated by the authors as independent variables, that is to say, as factors in an offender's background which "cause" him to behave as he does. Negative legal sanctions and any kind of treatment, whether or not so intended, are independent variables also. They "cause" or shape dependent variables, that is, the behavior and the so-called attitudes of an individual. Most studies conceptualize these dependent variables with little refinement. Crime, for example, is a very rough behavioral concept, and the legal classification of "criminal" is hopelessly crude as a dependent variable—as crude as using the concept of "property" in predicting who wins a restrictive-covenant case. When the authors stress classification in terms of race, age and so forth, they are putting the cart way before the horse. They are focusing, wrongly, upon independent rather than dependent variables, upon descriptive characteristics rather than upon behavior and feelings. Until the latter are properly conceptualized and measured, there is no way of calculating the effect of the criminal sanction or of civil treatment upon the individual offender. Without such knowledge, community intervention is apt to be futile, save for the custodial service it currently performs.

JEROME H. SKOLNICK†

23. This brief exposition of a systematic value analysis is based upon the numerous writings of Lasswell, McDougal and their associates. Two examples, most comprehensive and detailed, are LASSWELL & KAPLAN, POWER AND SOCIETY (1950), and Lasswell & McDougal, The Jurisprudence of a Free Society: Studies in Law, Science and Policy (mimeographed materials, Yale Law School 1954).

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